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No. 462

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

PHILIP HARRY KOOLISH AND SARA ALLEN KOOLISH, INDIVIDUALLY AND TRADING AS STANDARD DISTRIBUTING COMPANY,

Petitioners,

v.

FEDERAL TRADE COMMISSION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

HOMER CUMMINGS,
IRVIN H. FATHCHILD,
Counsel for Petitioners.

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The Commission's brief essentially begins and ends with the decision in *Federal Tr. Comm'n* v. *Keppel & Bro.*, 291 U. S. 304. But such reliance is without warrant either upon the record or in the opinion in that case.

This Court did not in the *Keppel* case indicate that the devices here in question in fact offend public policy. More

important, because Congress has indicated a paramount permissive public policy with respect to petitioners' activities, it was and is beyond the power of any court—and *a fortiori* beyond the power of the Commission—to declare that the mere supplying of raffle cards to others—together with merchandise or separately, does violate public policy.

Public policy, when not deducible from constitutional or statutory provisions, "is accepted as the basis of judicial determination, if at all, only with the utmost circumspection". *Patton* v. *United States,* 281 U. S. 276, 306.

It is a necessary corollary that determination in the *Keppel* case of a violation of law based entirely upon a purely judicial determination of prohibitory public policy cannot in this case, and as to different devices, be strained to control over and against the expression by Congress of a permissive public policy, particularly where there are lacking the pivotal facts in the *Keppel* case upon which this court based its decision.

The question there stated by the Commission to be presented for decision was whether "the sale of assortments of candy so arranged that they may be resold to children in a manner involving lot or chance" may be held to be "unfair" within the meaning of the Act.[1] On the merits the Commission urged that "as indicated in *Federal Trade Commission* v. *Beech-Nut Packing Co.,* 257 U. S. 441, 453, each case must be decided on its own facts", and it asserted that while the candy packages there involved were not actually fraudulent or deceptive, the invitation to "children" to engage in a chance transaction was "assimilable to deception".[2]

There was thus presented, and this Court decided, no broad question as to the existence of an "established public

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[1] Commission's Pet. for Cert., p. 2.

[2] Commission's Reply Brief on Merits, pp. 2-5.

policy of the United States" against transmission through federally controlled channels of chance devices. This Court said (*Fed. Tr. Comm'n.* v. *Keppel & Bro.*, 291 U. S. 304, 309, 313):

> * * * the method of competition adopted by respondent induces children, too young to be capable of exercising an intelligent judgment of the transaction, to purchase an article less desirable in point of quality or quantity than that offered at a comparable price in the straight goods package * * *
>
> * * * * * * *
>
> * * * we can perceive no reason for distinguishing between the element of chance *as employed here* and *the element of deception involved in labelling cotton goods "Natural Wool"*, as in the *Winsted* case. It is true that the statute does not authorize regulation which has no purpose other than that of relieving merchants from troublesome competition or of censoring the morals of business men. But here the competitive method is shown to exploit consumers, children, who are unable to protect themselves. (Emphasis supplied)

Thus, this Court found that the "break-and-take" candy packages there involved in effect constituted a constructive deception of the particular customers there involved—children.

So far as the Commission's jurisdiction is here sought to be rested upon a public policy recognized and applied in the *Keppel* case, that jurisdiction must fail. For the public policy there recognized was limited to inhibition of chance devices involving constructive deception. To rest jurisdiction in this case upon the an asserted right to enforce the same public policy would therefore be to satisfy the requirement of jurisdiction by a pure fiction. No of-

fense against such public policy is here involved. Here there is no element of child consumers and there has been no suggestion, much less any evidence, of resulting deception, constructive or otherwise.

But jurisdiction purportedly based on enforcement of an "established Federal public policy" must here fail for another and more obvious reason. The prohibitory public policy recognized by this Court in the Keppel case cannot by virtue of any purported analogy of devices properly be extended so as to create jurisdiction in the Commission to promulgate the prohibitions made in this case. Such extension of the public policy found to exist in the *Keppel* case would bring judicially-declared prohibitory public policy into sharp conflict [3] with permissive and controlling public policy which Congress, vested with paramount authority in this field, has indicated shall apply to petitioners' activities. That it is the firmly established affirmative intent of Congress *not to prohibit* chance means for interstate commerce or the mails where, as here, the sender retains no control over or interest in the operation of the means by the recipient, is demonstrated in the Petition, p. 15 et seq., pars. (1), (2) and (3).

It is established that the Commission, and the Courts in reviewing its decisions, *Fed. Trade Comm.* v. *Raladam Co.*, 283 U. S. 643, must recognize that the Federal Trade Commission Act forbids only those acts or practices "which

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[3] Of course, petitioners have never asserted any theory of "conflict between the Commission's order and the postal regulations" such as the strawman with which the Commission here tilts (Br. in Opp., pp. 10-11, note 4). The particular sphere of federal legislation in which Congress has clearly manifested the necessarily controlling public policy with respect to petitioners' activities, it so happens, is in postoffice legislation. It results, therefore, that the action of the Postmaster General in granting mailing permits to petitioners does lend affirmative emphasis to the manifestations of permissive public policy which, through persistent rejection of proposed legislation, had been evidenced by Congress in a negative but nonetheless definite manner.

offend against existing law and could be the subject of judicial condemnation without further legislation" or which may by the commission properly be determined to be wrong under "established principles of law." *Schechter Corp.* v. *United States*, 295 U. S. 495, 541. *Fed. Trade Comm.* v. *Sinclair Co.*, 261 U. S. 463; *Fed. Trade Comm.* v. *Raymond Co.*, 263 U. S. 565; *Sears, Roebuck & Co.* v. *Federal Trade Commission*, 258 Fed. 307.

There is no more firmly established principle of law than the rule that paramount power to determine public policy resides in the Congress, not in the courts or in the Federal Trade Commission. The courts and the Commission may independently determine what is the public policy only when the question has not been concluded by Congressional action.

Here, as shown in the Petition, Congressional rejection of legislation makes it manifest that the established public policy of the United States does not forbid but rather permits the placing in the hands of others of the means whereby property may be disposed of upon a chance basis.

Importance of the Issues.

The Commission suggests that its jurisdiction to prohibit the distribution of "push cards or other lottery devices—independently of the sale of merchandise as separate articles of commerce, is not an issue in this proceeding and no such claim has been made by the Commission" (Br. in Opp., p. 8, note 2).

But it is clear that the Commission is claiming such jurisdiction in pending cases (Petition, p. 6, note 3), and the order and decree here in question do profess to prohibit the distribution of the raffle cards not only "together with" merchandise but "separately" therefrom (R. 101, 152). And the opinion of the Circuit Court of Appeals gives approval to no such narrow set of facts as the Commission

suggests. It epitomizes and gives specific approval to what it states to be the Commission's finding "that petitioners supplied to and placed in the hands of others, means of conducting lotteries in the sale of merchandise," and holds that this is "contrary to the established public policy of the United States" (R. 119).

There would seem to be little ground for making a distinction which while withholding jurisdiction of the Commission where the distributors of the raffle cards are manufacturers or distributors of raffle cards alone, would permit its exercise against those who are distributors of other merchandise as well. "Push-cards" and "pull-cards" are used for raffling merchandise (*Schreiber* v. *United States*, 129 F. 2d 836, 837) and the mere fact that an act or practice is carried on in or in connection with the sale of merchandise, does not in itself establish jurisdiction of the Commission to prohibit such acts or practices. *Federal Trade Commission* v. *Gratz*, 253 U. S. 421; *Fed. Trade Comm.* v. *Sinclair Co.*, 261 U. S. 463; *Fed. Trade Comm.* v. *Raymond Co.*, 263 U. S. 565.

The Commission's course is petty. It does not and cannot prohibit games of chance or the use of push cards. Others will and do supply the cards; and others will and do supply the merchandise.[4] Prohibitions against the use of push cards, if any there be, go unenforced in many states and municipalities. The cards and merchandise are observable not only in city shops but in army canteens, tobacco stands, and country stores.[5]

[4] So far as we are aware, neither the manufacture nor the sale of punch boards or raffle cards is prohibited in any of our states. See the *Code of Fair Competition for the Punch Board Manufacturing Industry, National Recovery Administration*, approved by the President on March 2, 1934, wherein it is stated at pages 440-441: "During 1929 approximately 2500 wage earners were employed and in 1931 approximately 1800 wage earners were employed.

[5] Many department stores carry and sell not only raffle cards but as well merchandise which may be purchased for distribution by means of the raffle cards.

In the case at bar, the Commission's own witness testified that Mont-

Petitioners' methods are therefore not even unethical and, even if they were, this Court has specifically held that "the statute does not authorize regulation which has no purpose other than that of relieving merchants from troublesome competition or of censoring the morals of business men." *Fed. Tr. Comm'n* v. *Keppel & Bro.*, 291 U. S. 304, 313. The Commission nevertheless continues to push its jurisdiction in the direction of establishing what it conceives to be proper standards of public morals. The circuit courts of appeals, perceiving lurking phrases respecting "public policy" in the *Keppel* case and in the opinions of other circuits, leave the matter to this Court.

Since the Federal Trade Commission now treats the *Keppel* decision as creating a whole new field of jurisdiction, it is obvious that the issue of jurisdiction of the Commission based upon determinations of "established Federal public policy" which, initially at least, must be made by it, will become a constantly recurring question of ever-increasing importance. It is therefore respectfully submitted that as to the broad and all-inclusive interpretation announced and applied by the circuit court of appeals, this Court should hold, as it did in *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 354:

> The construction of section 5 urged by the Commission * * * of such far reaching import as is involved here, ought to await a clearer mandate from Congress.

November, 1942.

HOMER CUMMINGS,
IRVIN H. FATHCHILD,
Counsel for Petitioners.

CUMMINGS & STANLEY,
Of Counsel.

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gomery Ward & Company sells "poker chips and games of chance" and also other items of merchandise which might be purchased as "prizes" for distribution in connection therewith (R. 42).